IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 558

JOSEPH C. LENIHAN and JOSEPH P. KUNZ, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may elect to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervening-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,

and

CHARLES BURT, CHAIRMAN PRESIDING and FRANK W. MAYNE, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

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No. 553

IN THE

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October Term, 1940.

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Petitioners,

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CITY OF ST. PAUL, a municipal corporation,

Intervener-Petitioner,

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THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,

and

CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

I.

REFERENCE TO OFFICIAL REPORT OF THE OPINION BELOW.

The opinion of the Minnesota Supreme Court appears as *Lenihan, et al. v. Tri-State Telephone & Telegraph Co., et al. (City of St. Paul, et al., Interveners)* at 293 N. W. 601. The opinion has been printed for the Court by Petitioners in "Proceedings in Supreme Court of Minnesota" and appears there at pp. 1-20. Our citations are to that record as "Proc. St. Sup. Ct. p. ....."

II.

OBJECTIONS TO THE JURISDICTION.

Respondent respectfully asserts that the petition for the writ herein should be denied for the reason that no federal question was decided adversely to petitioners by the Supreme Court of Minnesota; further that the record herein fails to show that any federal question was presented for decision to the Supreme Court of Minnesota.

If the federal questions which petitioners now seek to have considered by this Court were decided adversely to them by the Supreme Court of Minnesota without being mentioned, it is submitted that the questions thus submitted are not substantial and, if they were decided by the Supreme Court of Minnesota, its decision was in accord with the applicable decisions of this Court.

Respondent further submits that the writ should not issue because the decision of the State Supreme Court rests upon non-federal grounds adequate to support it.

III.

STATEMENT OF THE CASE.

Under Rule 27, Respondent's duty to make a statement of the case is limited to that deemed necessary to correct inaccuracies or omissions in Petitioners' statement. This statement is so drawn as to be somewhat ambiguous. However, the opinion of the State Supreme Court (see Proc. St. Sup. Ct. pp. 2-10) contains the clear statement of the matter involved and we refrain from further comment except to add:

The opinion and judgment of the District Court and of the Supreme Court rested solely upon the pleadings of the plaintiffs and the defendants. Issues had not been joined on the Intervener's pleadings and were not considered (Rec. p. 129, f. 2).

The Intervener, City of St. Paul, knew of the issuance of the order here in litigation, agreed thereto, and accepted the benefits thereof; then later intervened in this action attacking the same (Rec. pp. 79-80, 84-86; Proc. St. Sup. Ct. p. 18).

IV.

ARGUMENT.

Summary of Argument.

1. No federal question was decided by the Supreme Court of Minnesota and the record herein fails to show that any federal question was presented to it for decision.

2. If the effect of the decision of the Supreme Court of Minnesota was to decide a federal question presented to it by petitioners adversely to them, the decision is in accord with applicable decisions of this Court.

3. The decision of the Supreme Court of Minnesota rests upon non-federal grounds sufficient to support it. The decision holds

A. That the order under review was valid as against the claim that it failed to comply with the statutes of Minnesota respecting notice, hearings, findings and other procedural requirements.

B. That the order, made as it was as a part of a settlement of pending litigation between the parties to such litigation, was within the powers of the Railroad and Warehouse Commission and the Attorney General and was valid.

1.

No Federal Question Was Decided by the Supreme Court of Minnesota and the Record Herein Fails to Show that Any Federal Question Was Presented to It For Decision.

Petitioners do not contend that the Supreme Court of Minnesota in terms considered or decided any federal question (Petition and Brief, p. 12). The opinion of the State Supreme Court (Proc. St. Sup. Ct. pp. 1-20) shows clearly that the court merely held that the order complied in all respects with the statutory requirements of Minnesota; and, independently of this ground of decision, held that the Commission and the Telephone Company had the right to settle the pending controversy respecting rates by placing in effect the order of May 2, 1939 (Proc. St. Sup. Ct. p. 20). Mason's Minnesota Statutes 1927, Section 134, requires that the Supreme Court of that State file its decision "together with headnotes, briefly stating the points decided." The headnotes appear at pages 1 and 2 of the Proceedings in the Supreme Court of Minnesota.

Inasmuch as the State Court did not in terms pass upon any federal questions, it is necessary to consider whether the effect of the decision was to rule adversely to petitioners upon a federal question which was properly presented to the State Court for decision though not mentioned by it. The record herein wholly fails to disclose that any such question founded upon the Constitution of the United States was presented to the Supreme Court of Minnesota for decision.

Petitioners cite only an allegation of the complaint which it is claimed presented a federal question in the Trial Court. It is not enough, however, that a federal question be presented in the Trial Court. It is essential in order to give this Court jurisdiction that the federal question relied upon be presented to the highest court in the State which has jurisdiction to pass upon it, and that the record show the fact of such presentation.

Chandler v. Manifold, 290 U. S. 665, 78 L. Ed. 575, 54 S. Ct. 93;

Dorrance v. Pennsylvania, 287 U. S. 660, 77 L. Ed. 570, 53 S. Ct. 222.

The record in this case is wholly silent as to what questions were presented to the Supreme Court of Minnesota except as the decision and the opinion of that Court reflected what was before it for decision. No petition for re-argument was filed suggesting that questions had been presented to and overlooked by the Court. We submit that the record in this case fails to disclose the essential basis for jurisdiction of this Court in that it fails to disclose that a federal question was either presented to, or considered or determined by the Supreme Court of Minnesota.

The only reference in this record to any federal question is in a single clause in the complaint, "That said order, Exhibit B, does not conform to the due process clauses of either the State or Federal Constitutions" (Rec. pp. 9-10). This sentence proceeds to allege that the order fails to contain certain findings which are enumerated as to the property, revenues and expenses involved.

The paragraph is indefinite and ambiguous. The best that can be made of it for Petitioners is a claim that under the due process clause of the Fourteenth Amendment a state commission can not make an order approving a change in a rate schedule of a public utility, the utility agreeing, without findings of the kind enumerated, and that this order lacked such findings. But the following sub-paragraph of the complaint numbered (9) (Rec. p. 11) discloses that the facts which plaintiffs were concerned to have found by the Commission were those required by the statutes of the State and by the Court in the previous rate case. It seems to have been thought that where the state law requires certain findings as a prerequisite to an order, the due process clause protects against an order made without such findings.

It is not necessary to consider whether there is anything in such a notion. It is for the State Court to determine what its laws require. The Supreme Court of Minnesota in this case has determined that this order observed all the statutory requirements of that State. Any federal claim under the due process clause based upon a contrary assumption disappeared with that determination.

If any federal question was presented it was that set out in the language of the complaint above referred to. No other appears in the record. There was no hint in the record of a claim that the *statute,* Section 5291, as distinguished from the order, was void as infringing the federal Constitution. That question can not be considered here unless the record shows that it was raised in the State Court. The record here fails to show that any of those questions were presented to the Supreme Court of Min-

nesota. It can not be asserted that Petitioners are excused from raising this claim in the record because the claim did not become pertinent until the State Supreme Court construed the statute as it did. The construction of the statute was one of the principal issues in the case. Petitioners can not maintain that they were surprised by the decision of the State Supreme Court which construed the statute as Respondent had contended it should be construed. Even if they had been, they must still have raised their federal question by application for rehearing. The record shows that no such application for rehearing was filed (Proc. St. Sup. Ct. p. 26).

McGarrity v. Delaware River Bridge Comm., 292 U. S. 19, 78 L. Ed. 1095, 54 S. Ct. 565.

Petitioner, City of St. Paul, in its complaint in intervention presented no federal claim of any kind (Supp. R. pp. 1-19). Respondent asserts the City may not be heard here claiming lack of due process for the power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment.

Risty v. Chicago, R. I. & P. Ry. Co., 270 U. S. 378, 70 L. Ed. 641, 46 S. Ct. 236;

City of Newark v. State of New Jersey, 262 U. S. 192, 67 L. Ed. 943, 43 S. Ct. 539.

Petitioners say in their petition and brief (e. g. p. 22) that they have persisted throughout the litigation in the claim that the order in question is in violation of the due process clause of the federal Constitution, but we find no

reference to the record in support of this contention except generally to the complaint and to the decision of the Supreme Court of Minnesota. In order to give the Petitioners standing to present these federal questions here, the record must show that these same federal questions were presented to the Supreme Court of Minnesota. The record in this case fails to show this. See *Lynch v. N. Y. ex rel. Pierson,* 293 U. S. 52, 79 L. Ed. 191, 55 S. Ct. 16.

2.

If the Effect of the Decision of the Supreme Court of Minnesota Was to Decide a Federal Question Presented to It By Petitioners Adversely to Them, the Decision Is In Accord With Applicable Decisions of This Court.

The broadest federal question which petitioners claim or can claim to have raised in this case may be described as an assertion that the order of May 2, 1939, and the statute which the Minnesota Court has construed as authorizing that order, are repugnant to the Fourteenth Amendment because of a failure to provide for public notice and formal hearing with a record and detailed findings based upon evidence covering property value, revenues, and expenses such as appear in the conventional confiscation case. Such a question, if it had been presented, would be unsubstantial and frivolous.

A telephone company, as in the case of common carriers generally, has in the absence of statute in the first instance the same right as any other seller to establish the charge for its service. *Arizona Grocery Co. v. Atkinson, T. & S.*

F. Ry. Co., 284 U. S. 370, 384, 76 L. Ed. 348, 352, 52 S. Ct. 183; *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557, 564, 63 L. Ed. 772, 777, 39 S. Ct. 375. Likewise it may increase or decrease an existing charge. *Arizona Grocery Co. v. Atkinson, T. & S. F. Ry. Co., supra; Interstate Comm. Comm. v. Chicago, G. W. Ry.*, 209 U. S. 108, 119, 52 L. Ed. 705, 28 S. Ct. 493. Subscribers of a utility at common law had no right to notice or a hearing before rates were fixed in the first instance or thereafter changed. Any such right arises only by virtue of statutory provisions.

In Minnesota a statute limits the right of a telephone company to change its rates and the nature and extent of such limitation have been established by the decision of the State Supreme Court in this case. The limitation simply is that such rates shall not be changed without an order of the Commission sanctioning the change. Section 5291, Mason's Minnesota Statutes 1927. The statute requires no public notice or hearing or any particular findings. The State Court has so construed its own law with finality.

The State was quite free to require that either more or less, or no formality attend a change of rates. It could leave the situation as it was at common law; it could require the public filing of tariffs, as it does; it could, as it does, require approval of its regulatory agency; it could have required other procedures. None of these courses in their normal operation gives rise to any constitutional question.

When the State in the more drastic exercise of its police power seeks to regulate rates against the will of the one regulated, everyone recognizes that this process must proceed in conformity with certain requirements which spring

from the due process clause. We are not concerned here with the boundaries of that field. The cases which are there pertinent have nothing to do with this situation.

Yet it is from these cases alone that Petitioners claim any support. (See Petition and Brief, pp. 25, 28, 44-46, 56, 57.) They must admit that Minnesota could, if it chose, withhold all regulation of rates. The Constitution requires none. They argue in effect, however, that, if Minnesota chooses simply to enact that when a telephone company changes its rates, it shall file them and have them approved by the Commission without other formality, a great constitutional barrier arises in its path. They say it can not do so. They say the only way it can take a step in this direction is to require that there be a public hearing with a full record of evidence covering a valuation of the company's property, an examination of its revenues and expenses of operation, and correspondingly elaborate findings,—in short, all the trappings of a "rate case."

The fallacy of such a contention is too apparent to call for extended discussion. Rate payers have no constitutional right to a hearing before rates are changed. They had no right to a hearing at common law. The State may impose on the utility such procedures as it sees fit by way of filing or the approval of a public agency as a condition to making a rate change effective. But such laws give rise to no constitutional rights in rate payers which do not exist in the absence of such laws. Many regulatory statutes, e. g., the Interstate Commerce Act (49 U. S. C. A., Sec. 6), provide that a carrier may change its rates merely by filing revised tariffs. In the absence of affirmative inter-

ference by the Commission, the new rates are effective without any hearing or order of approval. We have never heard it suggested that such statutes invade any constitutional rights of shippers to be heard.

The answer to all of Petitioners' contentions is that there is no constitutional right on the part of customers to notice or hearing, or any other prerequisites to consent by the agencies of the State to a change of rates or to have any particular form of procedure observed for their benefit. *Wright v. Central Ky. Natural Gas Co.*, 297 U. S. 537, 541, 80 L. Ed. 850, 56 S. Ct. 578; *Midland Realty Co. v. Kansas City P. & L. Co.*, 300 U. S. 109, 81 L. Ed. 540, 57 S. Ct. 345; *Wichita R. & L. Co. v. Publ. Utilities Comm.*, 260 U. S. 48, 56, 67 L. Ed. 124, 129, 43 S. Ct. 51.

Subscribers as such have no vested rights in any rate schedule. *Wright v. Central Ky. Natural Gas Co. supra*, 297 U. S. at p. 542.

Petitioners discuss as an apparently separate question a claim that Section 5291 is unconstitutional as construed because it denies to subscribers a right to judicial review of rate orders. We perceive nothing substantial in this contention.

In the first place, Petitioners have had a judicial review of this rate order. That is what this case is. Every ground upon which they attacked the order was considered and disposed of. If administrative action taken by the State is not of such nature as to be a possible invasion of due process, nothing in the federal Constitution is concerned with whether it is subject to judicial review. The State had the undoubted right to approve these new rates or to permit the Company to make them effective without

approval. Nothing in the Fourteenth Amendment requires that such action, itself within the unquestioned power of the State, be subject to judicial review. *Hibben v. Smith,* 191 U. S. 310, 322, 48 L. Ed. 195, 200, 24 S. Ct. 88.

But Petitioners are deprived of no remedy, judicial or otherwise. They could file a complaint with the Commission against the new rates and set in motion the conventional machinery to have determined their reasonableness. See *City of New York v. New York Tel. Co.,* 115 Misc. 262. Nothing has been made to appear which suggests that the Courts of Minnesota are not open to any person whose rights have been invaded by action of the Railroad and Warehouse Commission. This Court's concern with that question will not begin until a person appears who can exhibit such rights.

3.

The Decision of the Supreme Court of Minnesota Rests Upon Non-Federal Grounds Sufficient to Support It.

This Court will not take jurisdiction to review the judgment of a State Court in those cases where the decision, even though it decided a federal question, also rests upon non-federal grounds which independently of the decision upon the federal question are adequate to support the judgment.

Fox Film Corporation v. Muller, 296 U. S. 207, 210, 80 L. Ed. 158, 159, 56 S. Ct. 183.

In this case the decision of the Minnesota Court rests upon a wholly independent non-federal ground which is

entirely sufficient to support the judgment. As disclosed by the syllabus of the Court in this case, it was held:

> "1. Mason's Minn. St. 1927, sec. 5291, impliedly authorizes the commission to sanction new rates proposed by a telephone company without formal notice of hearings and taking of testimony, if satisfied that the rates are just and reasonable; and, as to users of services, the order of May 2, 1939, appears to contain adequate findings.
>
> 2. But apart from the foregoing, parties to pending rate litigation—the commission, representing the public, and the defendant telephone company—had the right to compose and end the controversy by superseding schedule of rates fixed by order of March 31, 1936, by schedule of rates promulgated by order of May 2, 1939" (Proc. St. Sup. Ct. p. 1-2).

The second of these grounds of decision is independent of any federal question and is entirely adequate support for the judgment. As the Court said:

> "As we view this appeal it can and should be disposed of on the ground that both sides to the pending litigation agree to end the same by superseding the rate schedule of March 31, 1936, by that of May 2, 1939" (Proc. St. Sup. Ct. p. 20).

The reasoning of the Court need not be repeated. It appears at pp. 16-18, Proc. St. Sup. Ct.

The State of Minnesota through its duly constituted agencies, the Railroad and Warehouse Commission and the Attorney General, had been carrying on a controversy over an extended period of time with Respondent Telephone Company concerning telephone rates in the St. Paul Metropolitan Area. This controversy had had various ramifica-

tions before the Commission and in the Courts of Minnesota. The facts with reference to this litigation are set forth in the opinion of the Supreme Court (Proc. St. Sup. Ct. p. 2 et seq.).

The Commission, the Attorney General, and the Company agreed upon a compromise and settlement of the entire matter consisting of the approval and putting into effect of new rates as prescribed in the Order of May 2, 1939, and the agreement by the Company to discontinue its litigation of the previous order, permit judgment to be entered, and make refunds accordingly (Proc. St. Sup. Ct. p. 3).

Intervener, City of St. Paul, acquiesced in this settlement and signed the stipulation for dismissal of the formal litigation, which stipulation recited the issuance of the May 2, 1939 order as being pursuant to the stipulation (Rec. 84, 86; Proc. St. Sup. Ct. p. 18).

The State of Minnesota, like any other litigant, was competent to agree upon the settlement of a controversy to which it was a party. This is true whatever the nature of the litigation and regardless of whether the controversy involved state or federal questions. The procedures to be followed in making such a settlement are exclusively for the State of Minnesota to determine for itself. Whether these procedures have been duly followed in a particular case is a question of State law for ultimate determination by the Supreme Court of Minnesota.

The Supreme Court in this case has determined that, under the laws of Minnesota, it was competent for the Commission and the Attorney General to agree upon and make effective the settlement in question. It has deter-

mined that the statutes of Minnesota have been in all respects observed and that a valid and effective settlement has brought about a termination of the litigation in question.

One of the terms of this settlement provided for the establishment of a new schedule of rates promulgated in the Order of May 2, 1939.

This ground of decision is entirely independent of any federal question which is claimed to be raised by the record before this Court. No claim is to be found anywhere in that record which calls in question the settlement, or the procedures incident thereto upon the ground that it disregards any asserted rights under the federal Constitution. Petitioners in their petition and brief apparently make no effort to call attention to any part of the record where any such claim was ever made.

We submit that this ground of decision furnishes an independent basis, that it is purely a question of State law, the decision of which is for the Courts of Minnesota, and

that it is, therefore, a non-federal ground of decision entirely adequate to support the judgment.

The Writ should be denied.

Respectfully submitted,

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